The Freedom of Commerce in War.

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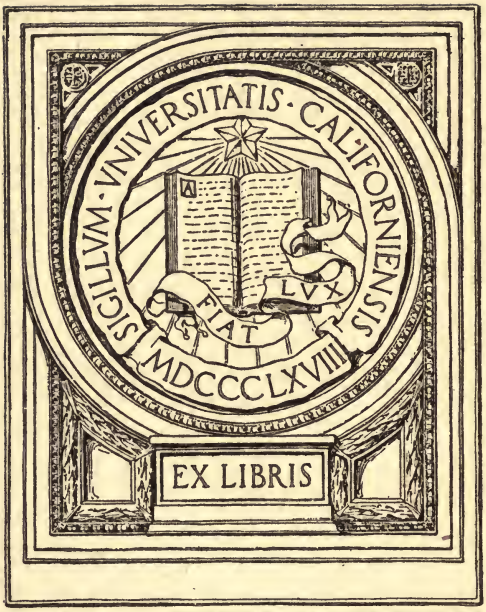
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By
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I.

ARGUMENT: *Unassisted no navy can guarantee our oversea supplies — Mr. Churchill's admission—The need of other protection than a navy can give—Why the Admiralty's plan of arming merchantmen will not work —The alternative.*

TO all nations the sea may be a path to power and fame; to England alone it is the means of existence. If her communications oversea are severed for a sufficient length of time, her merchants, manufacturers, professional men and workmen are as helpless for a living as fishermen kept ashore by a storm; she is not only defeated but she starves. Every Englishman knows that he lives by the sea, and he has also been taught to think that he lives by the navy. But the two propositions are not identical. The fisherman, for example, lives by the sea, but his best protection in his calling is not the navy, but the old rule of international law, which forbids attacks on his craft. In this respect he is better off than the rest of his countrymen who rely on the navy alone for the protection of their business in war. They, equally with him, depend for their living on the sea, but whereas the outbreak of

war exposes the fisherman to no new risks, they, through the act of the state and the caprice of luck, may lose everything without hope of redress.

The navy is not an ideal protector of commerce. Not only is it enormously costly, but it has other interests to serve which may prevent it from repaying to commerce in protection from the attacks of the enemy what it takes in taxation. So much is now officially admitted.

In introducing the Navy Estimates for this year (1913) Mr. Churchill said in effect that the protection of commerce, though an important, was only a secondary duty of the navy. Foreign nations, he explained, were mounting guns on their merchant ships, and it was necessary that English ships should be put in a state to resist their attacks. Accordingly, he proposed to arm them and to train guncrews; and the House of Commons, except for a few questions which were parried, has allowed this remarkable development of policy to go unchallenged and unexplained. Yet the moment it is set out in the open it is exposed to a gale of objections from almost every point of the compass. It is impracticable; for the regulations of many ports forbid vessels carrying explosives to lie alongside their wharves or to enter their docks, and foreign nations have only to

adopt these regulations to force shipowners to choose between abandoning their cargoes and abandoning their guns and ammunition. Secondly, even if it were practicable it would not be efficacious. The ships that are most in need of protection are not the fast liners but the slow tramp steamers, who in the nature of things cannot all be armed. Yet to arm the liners and not the tramps would be an unfair discrimination in favour of the wealthier shipping companies and the larger ships. Moreover, it would not protect even this limited number of ships from the attacks by naval cruisers, which are most to be dreaded, and it would increase their risk of destruction if they were attacked and resisted. But there is also a third and more important objection. Even if the arming of merchantmen were practicable and effectual it would still be a dangerous and reactionary measure.

By the Declaration of Paris in 1856 privateering is, and remains, abolished. A privateer was a ship licensed to attack the enemy's commerce, to bring its captures into port, and to receive prize money if the Court adjudged the capture good. The line which separates the new armed merchantmen from the old privateers is thus a somewhat narrow one, and is very easily overstepped. If they waited until they were attacked before they defended themselves they would not come under the ban

of the Declaration of Paris, but if they attacked first they would be privateers and liable to be sunk. Yet it is notorious how difficult it often is to determine which of two parties in a fight struck the first blow, even when there are impartial witnesses. In these sea fights there would be no witnesses. An armed merchantman would be under temptation to attack a likely victim for the sake of the prize money, and then to plead that it only attacked in self-defence. On the other hand, the destruction of armed merchantmen would always be defended on the plea that they attacked first, or that they had not complied with the regulation of the Hague Convention on the conversion of merchant ships into warships. The seas would become as insecure as in the eighteenth century, and the only result of the arming would be to expose commerce in war-time to greatly increased risks.

It is amazing that the Admiralty should have flung a policy so ill-considered, so exposed to objection, and so dangerous, in the face of Parliament. What does it mean? It means that the days of convoy are over, that no navy, however strong, can guarantee absolutely the security of maritime commerce against attack, and that the Admiralty is more seriously alarmed over the residuum of risk than it cares to admit. It pricks a hole into the perorations

which have defended the cost of the navy as a necessary insurance premium on the safety of our oversea supplies, and have asked us to identify the interests of our foreign commerce with the size and power of the navy.

The danger, then, is now confessed, and the necessity of additional precautions, over and above what a supreme fleet can afford. We have seen how illusory and dangerous are the precautions prepared by the Admiralty. The object of this pamphlet is to set out the alternative.

II.

ARGUMENT: *The armed neutrality—Pitt and the "Jacobin" doctrine of "Free ships, free goods"—The changes made by the Declaration of Paris—A halting compromise—Political cross-currents—Disagreement between Cobden and Mill.*

The present state of the law of capture at sea is not to be understood without a historical retrospect. The rules of capture on which this country acted in all its wars with the French were those of the *Consolato del Mare*, a code recognised as early as the eleventh century and accepted by Grotius. By it, a belligerent's property, public or private, might be seized under all circumstances, whether it was being carried under his own or a neutral flag; on the other hand, neutral property, except contraband, was always exempt from capture. If the ship was hostile and the cargo neutral property, the ship was good prize and the cargo not; and, conversely, if the cargo was enemy's property and the ship neutral, the cargo was good prize but not the ship. These doctrines were never questioned until the middle of the eighteenth century, when the King of Prussia pleaded for the principle that the flag ought to cover the

cargo. An enemy's flag, on his view, ought to infect even neutral cargo with a hostile character and so expose it to the risk of capture; and, on the other hand, the neutral flag should redeem the enemy's property under it from its hostile character and exempt it from capture.

These two theories came into sharp conflict in the later stages of the Hundred Years' War between England and France. The neutral states resented our assertions of the right to capture enemy's property under their flag, and in 1780 a league was formed, known as the Armed Neutrality, of Russia, Sweden,Denmark, Prussia, Holland, France, Spain, and the United States, to enforce the doctrine of capture first put forward by the King of Prussia. A second League with the same object and the same ill-success was formed in 1800. "I have taken the earliest measures," said the King's Speech in 1801, "to repel the aggression of this hostile confederacy and to support those principles which are essential to the maintenance of our naval strength. The "earliest measures" were the bombardment of Copenhagen. Pitt used the strongest language in condemning the doctrine of law put forward by the Armed Neutrality. "Shall we give up our maritime consequence and expose ourselves to scorn, to derision and contempt? No man can deplore

more than I do the loss of human blood—the calamities and distresses of war, but will you silently stand by, and, acknowledging these monstrous and unheard of principles of neutrality, ensure your enemy against the effects of your hostility? Four nations have leagued to produce a new code of maritime laws which they endeavour arbitrarily to force on Europe; what is this but the same Jacobin principle which proclaimed the Rights of Man, which produced the French Revolution, which generated the wildest anarchy and spread horror and devastation through that unfortunate country? Whatever shape it assumes it is a violation of the rights of England, and imperiously calls upon Englishmen to resist it even to the last shilling and the last drop of blood rather than tamely submit to degrading concession or meanly yield the rights of the country to shameful usurpation."

Half-a-century later, by the Declaration of Paris, England voluntarily agreed to doctrines which Pitt was prepared to shed the last drop of his countrymen's blood to resist. The Declaration did more than accept the doctrines of the Armed Neutrality. It took both from the English practice and from the principles of the Armed Neutrality, the part most favourable to neutrals. From English practice it took the rule that neutral property was not good prize

in a hostile ship, and from the Armed Neutrality the rule that the enemy's property was covered by a neutral flag. And these are the rules that now bind every power in Europe but Spain. Our signature to the Declaration could only mean that from henceforth our interests as neutrals were held to over-ride our interests as belligerents. Lord Palmerston saw the conclusion to which this principle would logically lead us, and in a speech to the Liverpool Chamber of Commerce, expressed the hope that the relaxations made by the Declaration might be still further extended, so that no private property should be longer exposed to attack. "If we look at the example of former periods," he said, "we shall not find that any powerful country was ever vanquished through the losses of individuals. It is the conflict of armies by land and of fleets by sea that decide the great contests of nations." The United States refused to sign the Declaration on the ground that it did not go far enough, and exempt all private property (except contraband) from capture; and negotiations were begun between England and the United States for the conclusion of a special treaty, freeing private property from capture, such as the United States had made with Prussia in 1785, and was to make with Italy in 1871. These negotiations were broken off by Lord John Russell. Had they been successfully con-

cluded, there would have been no Cotton Famine in Lancashire.

The Declaration of Paris produced a remarkable cleavage of opinion amongst both Liberals and Conservatives. The Manchester School and the Philosophic Radicals were agreed that the Declaration had greatly weakened our belligerent power. "Have you ever thought," asked Cobden, "while the Declaration of Paris was being signed, what the effect of the new principle that free ships make free goods will be when we are at war? All our carrying trade would, of course, be in the hands of neutrals. Who would carry goods in an English bottom and pay twenty per cent. against capture when ships under other flags would sail without any such burden?" But while Cobden and Bright were anxious that the Declaration should be extended so as to give immunity to all trade, except in contraband, Mill wanted to go back to the old practice. Cobden regarded the extension as the necessary corollary of the repeal of the Navigation Laws, and the Corn Laws, and the abandonment of our Colonial monopoly. Mill, on the other hand, thought that exemption of private property from capture would make wars too easily borne and therefore more frequent. A similar division of opinion has shown itself amongst Conservatives.

Mr. T. G. Bowles has argued brilliantly for returning to the old rules upon which England acted in the wars with France; on the other hand, Conservatives like Mr. F. E. Smith are strong supporters of the Manchester view.

The question, then, is in no sense a party one, and the divisions of opinion upon it run across the ordinary divisions of political thought. The conflict, waged intermittently since the Declaration of Paris, has rather been between the departmental and the commercial view of British interests, and only latterly has the greater public begun to take cognizance of the arguments. Of this new public interest the resolution in favour of the exemption of private property from capture, which was passed by the National Liberal Federation at its last annual meeting, was the most recent and most unmistakable sign.

III.

ARGUMENT: *The fleet under present rules valueless except for preventing invasion—Why commerce destruction cannot do great injury to a Continental power—Its grave dangers to an island power—The dice loaded against England.*

"I believe," said Lord Salisbury in 1871, "that since the Declaration of Paris the fleet, valuable as it is for preventing an invasion of these shores, is almost valueless for any other purpose." This, then, is the first question to which an answer must be sought. How much injury can we do to the enemy by the capture of his private property at sea? To what extent are we likely to shorten the war by the exercise of this right, and so save human life and suffering? Lord Loreburn, in a series of letters that have appeared recently in the *Manchester Guardian* and other papers, has examined separately the case of a war with France, with Germany, and with the United States, and with regard to them all has reached the same conclusion as Lord Salisbury. The case of Germany is particularly worth taking, not because war with Germany is more likely, but

because it is more favourable to the opponents of change and will give us the measure of the right of capture at its highest valuation.

No naval supremacy of ours, however overwhelming, could prevent Germany in a war with England from obtaining all the supplies that she now imports from abroad. If there were no blockade she could import everything that she wanted in neutral ships. Her own ships, if they put to sea under the German flag, would be liable to capture; and, in any case, the insurance freights would be too high to let them do business at a profit. Either they would be laid up idle in harbour or they would be sold to a neutral power. As neutral ships they could, of course, bring everything (except contraband) into German ports that they brought as German ships; but even if their sale to a neutral were not recognised as valid, the only result would be to send up the freights of the goods brought in other neutral ships whose character could not be challenged. German seamen would be unemployed, shipping companies trading from ports on the North Sea would lose their profits (the Baltic trade would be less affected) prices would rise to the extent of the merchant shipping thrown out of employment, and the removal of its competition and the

consequent higher freights. That is all. Even if there were a blockade of the North Sea ports, the goods would still come in. They could be imported through French or Dutch ports and brought in by rail; even British shipping, prevented from trading direct with German ports, could, and would assist in supplying German wants through neutral ports in railway communication with Germany. The total injury that we could do Germany by these means could be assessed in money, and it would not exceed a small percentage on the cost of a great war.

Is it seriously pretended that a local injury of this kind and a fractional increase of the cost of war would bring Germany to her knees, or even materially shorten the war? On France, or Russia, or the United States the effect would be even less.

The immunity of Continental nations from the effects of capture is largely due to railways, which have provided all nations with alternative lines of communication. In the Napoleonic wars land transport was difficult on a large scale; and the blockade of a port would sometimes produce a local famine, not because there was real scarcity in the country, but because, except by sea, there were no means of getting the supplies to where they were wanted. Europe under blockade, before railways were

made, was like India in the famines, with plenty in one district and starvation in the next. There was an abundance of supplies in Spain before Trafalgar, but the Spanish and French fleets blockaded in Cadiz were forced to go out and fight because there was none in the town. Trafalgar would not have been fought if Spain had had railways. Nor would a return to the old rules of capture, under which enemy's property would be liable to confiscation in a neutral ship, restore the old conditions. Even in the Napoleonic Wars it was necessary to have recourse to the doctrine of continuous voyage, by which we asserted the right to seize cargoes on their way to a neutral port if it could be shown that their real destination was a port of the enemy. But with railways connecting every port in Europe with every other, if we desired to produce anything like the same effects by a war on the enemy's commerce as were produced then, it would not be enough to restore the old rules of capture, but we should also have to extend the doctrine of continuous voyage, so as to make goods liable to capture on their way to a neutral port if it could be shown that they were really intended to be forwarded by rail to the enemy's country. Such an extension would be impracticable, and, if it were attempted, would drive every neutral power to take up arms

against us. The modern tendency is in the opposite direction. By the Declaration of London we agreed to limit the doctrine to absolute contraband and to voyages continued to an enemy's port, unless, indeed, the enemy's country had no seaboard at all.

We reach the conclusion, therefore, that even in the case of Germany, which is the most favourable, the utmost damage that we could do her by the capture of her goods at sea would amount to a few millions a year. We have now to set on the opposite side of the account the losses that we are likely to suffer under the present rules of capture.

The first item in this account is that percentage of the losses suffered by the enemy that would fall upon ourselves. What it would amount to is difficult to estimate, but it would be considerable. Any diminution of German wealth and purchases would be followed by a diminution of our own sales, which would soon wipe out the gain to our shipowners through the rise in freights caused by the withdrawal of German ships from the market. International trade is "all one"; nations gain by each other's gain, not by their loss. But, apart from the operation of this general law, there are quite specific reasons for apprehending loss even to a successful belligerent. In the first place, marine insurance is international. Lloyd's take

insurances from all countries in the world; in 1910 there were seventy foreign marine insurance offices in Hamburg and only nine German. Sometimes, again, the shares of an insurance company are owned by a foreign company, and shipping companies often own shares in each other. The Morgan Trust, for example, pays the Hamburg-American and the North German Lloyd Lines six per cent. on a capital of a million, and the German companies pay an amount corresponding to the dividend on a share capital of the same sum. Any injury to these German lines, therefore, would reflect on English and American capital. Dividends and insurances due to a belligerent might not be actually paid during the war,* but they would be due at the end of it. War only suspends the execution of contracts; it does not annul them. To the extent, therefore, that shipping and insurance are internationalised, the loss suffered by one belligerent would sooner or later fall upon the other too. Any injury that we could do to Germany by capturing her ships or her cargoes would also be an injury to ourselves.

A second, and probably a more serious item on the debit side of the account, is the loss that the existing rules would inflict on our own

* But see Appendix B.

shipping. British shipping equals that of the whole of the rest of the world; consequently it presents a target to attack far larger than that of any other single mercantile marine. Our tonnage is five times that of Germany, and under equal conditions we should expect to lose five times as much by capture as Germany. But whereas the German merchant marine is mainly in the hands of liners, the English marine consists very largely of the so called tramps, which, being slower, would fall an easier prey to attack; and, owned as they are by smaller companies, their capture would cause far greater financial inconvenience. In spite of unchallenged supremacy at sea and a very elaborate system of convoys, we always lost more ships than France in our wars with her. In the Seven Years' War England lost 2,500 ships; France only 950. In the war with Revolutionary France and Napoleon England lost 10,871 ships—more than France's whole merchant navy. To strike the balance, from the loss to the enemy by capture we have first to deduct the proportion of the loss that would ultimately fall on English shipping and insurance companies and English merchants; and secondly, to offset the certainty of greater losses by the capture of English ships. Already the injury to England from the existing laws of capture exceeds the injury that could be done to the other belligerent.

But we have barely touched the main items of the account of loss. In the Napoleonic Wars it was not an advantage for a belligerent to send his goods in neutral instead of in his own ships, for they were equally liable to capture. Commerce sought the safest ships, and it was actually safest in belligerent ships, for there it could only be attacked by the other belligerent, whereas in neutral ships it was liable to attack by both. The belligerent which had the stronger navy thereby made sure of increasing his mercantile marine. But since the Declaration of Paris, neutral ships would be the safest, no matter how strong the navy of a belligerent might be. "If our cargoes would be safe in neutral bottoms," said John Stuart Mill, "but unsafe in our own, then if the war was of any duration, our whole export and import trade would pass to neutral flags; most of our merchant shipping would be thrown out of employment and would be sold to neutral countries, as happened to so much of the shipping of the United States (in the Civil War) from the pressure of loss on them, it might almost be said of a single cruiser. Our sailors would naturally follow our ships, and it is by no means certain that we should regain them even after the war is over. . . . A protracted war on such terms must end in national disaster."

It is doubtful to what extent a belligerent would recognise the validity of transfers made after war had begun; he would certainly insist on very strict proof that they had acquired a new nationality. But in any case the transfer would be gradual; it would take place on an extensive scale only when experience had shown that supplies could not be brought in belligerent ships. This experience might be painful to British shipping, which, however, would find some compensation in the rise of freights; but it would be disastrous to every other industry. Even if not a single ship were captured, there would be an immediate speculative rise in the prices of raw materials. England is the greatest industrial country in the world because the materials of industry are cheaper here than in any other country; but the margin of advantage is often very narrow. It would disappear in a serious war. Nor would all the advantage in such case necessarily go to the neutral. It might go to the continental state with which England were at war. For it would always be possible for Germany, for example, to import her raw materials through French or Dutch ports. We might be invincible at sea, but our commercial rival, able to import with perfect immunity the raw materials of his industry from some neutral port, might all the time be beating us out of our markets. To be an

island state under the old rules of capture and before there were any railways was a positive advantage in war; now, except for the greater security from invasion, it is a disadvantage. Every continental country has interior lines of communication which the navy could not touch; the island country has none.

The Royal Commission on Food Supplies which reported in 1905, took an extremely sanguine view of the effect of war generally on prices, but it admitted enough to show how great the danger of any insecurity in our sea communications would be. "We do not," says the Report, "apprehend that any situation is likely to arise in which there would be a risk of the actual starvation of our population into submission. But we do regard with much concern the effect of war upon prices, and especially therefore on the condition of the poorer classes, for they will be the first to feel the pinch, and it is on them that the strain of increased prices would chiefly fall." But to admit that the price of foodstuffs would rise is to admit that the price of all the raw materials of industry would rise. The same causes that would impoverish the table of the working man or transfer our shipping to a neutral flag, might bring manufacturers to a standstill and drive away trade from this country to that of a neutral rival, or even of the enemy not depen-

dent on his own ports for his supplies. That we should be reduced to starvation and to submission by these means, so long as our fleet kept the seas, is in the highest degree unlikely; that we should suffer serious and perhaps permanent injury if the war were protracted, is almost certain.

IV.

ARGUMENT: *The proposal to exempt private property at sea from capture—England's opposition—The grouping of the Powers at the Hague—Sir E. Grey's arguments—The analogy with land warfare—The abolition of commercial blockade—Distinction between naval and commercial blockade.*

We are driven to the conclusion, then, that however victorious we were at sea, a war on commerce would inflict incomparably greater losses upon England than upon any other Power. So long as there is a neutral in Europe, even a blockade cannot prevent the enemy from receiving its supplies; England, on the other hand, could not stand a blockade for a month. Not only are we more dependent on foreign supplies than any other Power, but we have only one source of supply, which can be closed, whereas they have many, some of which cannot possibly be closed. Why, then, has England always been at the head of the opposition to a change in the law, from which, though all nations would gain, she has the most to gain of all?

Mr. Choate, the senior representative of the United States at the second Hague Conference in 1907, brought forward a proposition in the following terms :—" The private property of all citizens or subjects of the signatory Powers, with the exception of contraband of war, shall be exempt from capture or seizure on the high seas or elsewhere by the armed vessels or the military forces of any of the said signatory Powers. But nothing herein contained shall extend exemption from seizure to vessels and their cargoes which may attempt to enter the port blockaded by the naval forces of any of the said Powers." Before discussing in detail the objections raised by the British representatives to this proposition, it is useful to take note of the attitude of the other Powers in regard to it. As Mr. Choate reminded the Conference, the policy of the United States in regard to this reform had been consistent ever since 1783, when Benjamin Franklin proposed that the United States and Great Britain should make a treaty allowing their ships to trade unmolested in time of war, provided they were unarmed. France was willing to support Mr. Choate if unanimity could be reached ; failing that, she suggested that prize money should be abolished, and that the State should indemnify owners for their losses by capture. She accepted the American argument, derived from Rousseau,

that war was a relation between States, and not between the individuals composing them; any losses that it caused shoud be public, not private; and it was as improper that individuals should gain by it as that they should lose. Russia opposed the proposal, mainly, it would seem, on the ground that the fear of pecuniary losses was a deterrent from war. The Chilian and Argentine representatives also opposed, on the ground that war on commerce was the weapon of the weaker naval Powers. Germany supported the proposal, provided that an agreement could be reached on the closely allied questions of contraband and blockade. When the American proposal was put to the vote, 21 States voted for it, of which the United States, Austria-Hungary, Germany, Belgium, Holland, Italy, Greece, Norway and Sweden, and Brazil were the most important; and 11 against, among whom were England, Spain, France, Russia and Japan, and some South American States. The French proposal that the Powers should consider the means of abolishing prize money was adopted by sixteen votes to four; and a proposal for State indemnity of private losses from capture was defeated by thirteen votes to seven. In this minority of seven, however, was England.

The English vote for the principle of State indemnity was important. The Royal Com-

mission on Food Supplies in War Time had recommended State indemnity for losses of ships and cargoes, but a Committee which sat later to draw up a scheme found so many practical difficulties that it reported against the proposal. That was in 1908, the year after the Conference. But the practical difficulties do not affect the value of the principle that was admitted; on the contrary, if one way of carrying it into effect is found impracticable, the obligation to adopt another which is practicable is all the stronger. Until it is found and adopted, this vote at the Hague Conference stands on record as an admission that shipping and commerce are being unfairly taxed to maintain the existing rules of capture. We may go further and say that so long as the institution of prize-money remains, the gains of naval officers and men who make captures are the measure of the losses of shipowners and merchants who suffer from captures, not to speak of the injury through high prices to the "poorer classes" which the Royal Commission commiserated.

In his instructions to our delegates at the Hague, Sir E. Grey pointed out that the navy was our only weapon of offence, and that we must be careful not to blunt it by abandoning the right of capture. If, however, foreign nations would agree to restrict their powers o

offence on land by limiting their armies, he held out the hope that we might consider the restriction of our own offence at sea. We have already seen reason to think that this particular weapon of offence is one that would pierce our own hand if we used it, and Sir E. Grey's offer to the Powers of Europe to surrender what many of them believe to be, and what in fact is a great disadvantage to us, if they would reduce their military predominance over us, was not likely to appeal to any one. That Sir E. Grey should ever have made such an offer shows how ingrained is the departmental habit of regarding foreign policy as an adjustment and re-adjustment of diplomatic values. Either the change is in British interests or it is not. If it is, it ought not to be made conditional on what other nations do; if, on the other hand, it is against our interests, we are not to be reconciled to it by the Continental Powers adopting a policy in regard to land armaments, which however advantageous, could not affect one way or the other our interests at sea. However drastic the reduction of Continental armies might be, enough soldiers would be left to invade us if our fleet were driven from the seas.

But in any case the just correlative of the law of capture at sea is not military strength or weakness, but the law of war on land. It would be a fair answer to Sir E. Grey's proposition for

the Continental Powers to ask us to bring the laws of sea war up to the same standard of humanity as the laws of war on land. Land warfare does not recognise the right of booty. Article 46 of the Hague Convention of 1899, following the provisions of the Brussels Conference in 1874, declares that "private property cannot be confiscated." Why should private property unconfiscable on land be confiscated at sea? Why should a military officer be forbidden to seize a consignment of wheat in a railway truck, and not merely not prohibited but actually encouraged, by the hope of pecuniary reward, to seize the same cargo in a steamer? The answer sometimes given is that a general may make requisitions on the population of a territory occupied by his army. But he can only do so when they are necessary to the army of occupation, and they must be in proportion to the resources of the country (Article 52). But a naval officer need plead no such excuse when he is seizing private property at sea, nor need he stop to consider whether the owners of a cargo can afford to lose it; he is paid for his captures, whereas the army officer must pay for the supplies taken from the country which he occupies in ready money, and if that is impossible, must give a receipt. Then it is said that the conditions of naval war are wholly exceptional, and that whereas an army

officer can take what he wants and leave the rest alone, at sea a vessel must be either captured or allowed to go scot-free. But when the general of an occupying army makes requisitions he does at any rate give something in return. He is the temporary *de facto* government in the occupied territory, and he gives its inhabitants guarantees of protection. Not so the commander of a commerce-destroyer. His captures are made on the open sea outside the three-mile limit in waters that belong to no one, and so far from guaranteeing their safety he is the chief menace to it. It is true that women and children are not directly affected by captures at sea, but the indirect effect upon them by the loss of a cargo of foodstuffs may be far more serious than by requisitions made by a conquering army. Where a village is occupied the women and children are on the scene, and when a ship is captured they are off; but the inhumanity is not thereby diminished. Rather is it increased if the results are hidden and outside the responsibility of the captors. A general may besiege a fortified place, and prevent supplies from reaching it; but he may not draw a cordon round a whole district and prevent all access to it in order to reduce the population to famine. The naval officer may do both these things. The commercial blockade is an exact parallel to the starving out of a civil population

which is forbidden by the rules of land warfare. There is no getting away from the fact that the rules of war on sea, dating as they do, with modifications in favour of neutrals, from the eleventh century, are less humane than the rules on land. The late Sir Henry Campbell-Bannerman described the concentration camps in the South African War as the "methods of barbarism." But at any rate, the segregation of the civil population was an acknowledgment by the conqueror that if he destroyed the means of subsistence in a country, he was under a moral obligation to feed the non-combatants. Warfare at sea denies any such obligation. It is one of its main objects to starve the civil population of all supplies brought in ships of its own nationality, and it never dreams of undertaking the responsibility of feeding them. The advocates, therefore, of the present rules of capture have no right to ask for a reduction of armaments as the price of their surrender. There is upon them a much more elementary duty of bringing the laws of war at sea out of the barbarism of mediæval methods, and of making them at least as humane as the rules governing war on land.

A second argument always advanced by England against the relaxation of the present rules of capture is that ultimately it would involve the abolition of blockade. Rather than

abolish blockade, the British representative at the last Hague Conference, proposed to abolish contraband. Let us see what this proposal means. If contraband were abolished, a neutral could supply a belligerent with all the munitions of war, and unless a blockade had been declared and made effective, the other belligerent could not interfere with their importation. If blockade on the other hand were abolished, all articles destined for civil use and not for the purposes of war, could be imported freely. The proposal for the abolition of contraband is thus one to make it easier for a belligerent State to carry on the war, provided the other belligerent retains his liberty to put pressure on the civil population by blockade. The alternative proposal for the abolition of blockade would relieve the civil population of all anxiety about its supplies, and give it perfect freedom to carry on its ordinary business, but would allow the enemy's fleet to stop the importation of the military and naval supplies necessary for the prolongation of the war. Is any doubt possible which of these two principles is the more humane and reasonable? Does not this proposal to give greater license to the State in importing military supplies, but to retain the power of furnishing the civil population by blockade, offend flagrantly against the principle that war is a relation between States, not

between individuals — a principle expressly acknowledged by France, and also implicitly by England, when she consented at the Hague to State indemnity for private losses by capture ?

" Great Britain's absolute dependence on the prowess of sea-power," wrote Sir E. Grey, in his instructions to the British delegates at the second Peace Conference at the Hague, " makes it imperative for her to maintain intact the weapon of offence which the possibility of effectually blockading an enemy's coasts places in the hands of a nation having command of the sea." We have already seen some reason for thinking that this weapon would be inhumane if it were efficacious, because it is one pointed not so much against the Government which has begun and is continuing the war, as against neutrals and non-combatants. But how much, after all, is the weapon worth to us ? Since the Declaration of Paris, very little indeed ; for as we have already pointed out, there is nothing to prevent any Continental nation with which we were at war from importing its supplies through a neutral port, and having them forwarded by rail. If the only naval weapon of offence is the power of compelling an enemy to import what it wants through the ports of a neutral instead of through its own, the offensive power of a predominant navy has been strangely

over-estimated. But the power of blockade is only one of many offensive weapons which the navy has at its command, and the least valuable, and one which because it is pointed not against Governments, but against neutrals and non-combatants is more honoured in its abandonment than in its use. It was argued at the Conference by the British representative that our attempt to limit blockades would produce friction. But is any institution likely to produce more international friction than a blockade, which can be evaded by importing by rail from a neutral port? It might actually, under the present rules, pay us in a war with Germany to be at war with Holland too, so as to prevent Germany from importing everything that she required under the very nose of a British blockading squadron, by way of Rotterdam; or to involve Belgium in our war with France, to prevent Antwerp being used as a neutral, and therefore inviolable, basis of supplies.

There is a clear distinction to be drawn between a blockade of the enemy's Government and of the people, between a warlike operation against the armed forces of an opposing State, and measures punitive of innocent commerce. No doubt the continuance of commerce indirectly helps a Government to continue the war, but then so does any human activity. The law of war cannot take cognisance of these

indirect means of assistance. There is a naval blockade, corresponding with the military operations of a siege. And there is a commercial blockade, corresponding with nothing permissible in land warfare. The first blockade should be kept up, the second should be made illegal on sea as it is on land. Nor should we lose by abandoning commercial blockade. With modern navies a close blockade is becoming increasingly difficult. A blockading squadron cannot lie very close in, and to seal up a port effectively a great preponderance of naval strength is required. Our wisest policy will be to limit the number of ports that we shall need to watch. To distribute our naval strength among all the enemy's ports capable of importing supplies from abroad,might be to disperse it dangerously and to run the risk of defeat. Two tests of this distinction between naval and commercial blockade may be submitted. First, if a port is a naval arsenal or is sheltering the ships of the enemy, its blockade is a naval operation and is permissible. Secondly, if a port, though not an arsenal or a place of arms, is being used as a basis for the operations of commerce-destroyers, or, if invested by land, by an armed force, and the blockade may be held to be a completion by sea of the siege lines, in such case again the blockade is permissible. Non-combatants may suffer from such blockade, but their suffering is incidental to the scheme

of military operations, and not its whole or main object as in commercial blockade proper. It will not do to argue that this distinction cannot be observed, for in fact a distinction was drawn on similar lines in Articles 33-36 of the Declaration of London. If the destination of conditional contraband be such as would give the enemy the right to capture it, such port of destination may properly be subjected to a naval blockade. But if the destination raises no such presumption, then the blockade of such port of consignment would be a commercial blockade, and should be made illegal.

V.

ARGUMENT: *The political and commercial effects of exemption—The Abbé de Mably—The objection considered that wars would become too easy and more frequent—The best chance of reducing naval armaments.*

If the reforms here suggested were carried out, the only direct effect that war would have on the commercial life of the belligerents would be to suspend direct commercial intercourse between them. England at war with France would trade unmolested with every other nation, and even with France her trade could continue, provided that it went through neutral countries. Her supplies of foodstuffs and of the raw materials of her industries would come in as usual in her own or in neutral ships; their price would be unaffected, except to the extent that war might cause a diminution of production; and the navy, released from the duty of commercial blockade, and of protecting our own imports, would be free to devote itself to its purely strategic tasks of masking the enemy's fleet and preventing invasion. It would cease to be an advantage to a port to be fortified. The more defenceless it was, the more secure it would be against the risk of blockade. There would be a clear severance

between naval and commercial interests. The unnatural alliance between commerce and naval armaments would be broken down. Trade would be free, so long as it refrained from supplying the enemy with the actual munitions of war. It may even be questioned whether, under such conditions, the formal prohibition of commercial intercourse between the belligerents would be worth keeping up. Already in the eighteenth century the Abbé de Mably, the first famous jurist to advocate the immunity of private property from capture at sea, argued that there was no reason for prohibiting commercial intercourse between belligerents. "Why," he asked, "do nations, in declaring war, forbid all reciprocity of commerce? This usage is a relic of our ancient barbarism. Ought we to indulge our hatred towards our enemies when we ourselves become the victims of our own resentment? Perhaps a system of politics at once timid and resourceless has persuaded us that it is dangerous to receive an enemy's subjects in time of war. I agree that it would be imprudent to accord them the same liberty that they enjoy in the time of peace; but what inconvenience would there be in two nations allowing their merchants facilities to frequent one or two free ports? It would be easy to establish in such places a system of police that

would reassure the most suspicious. In prohibiting commerce the object is sensible enough—that of injuring your enemy; but it is a mistake if, in so doing, you do yourself as much harm as you seek to inflict upon him. In the existing state of Europe every country, thanks to the policy of prohibiting commerce in time of war, finds itself suddenly deprived of some branch of its trade, and suffers from the loss. Its merchants are surfeited with a mass of undisposable commodities which deteriorate in the warehouses; the revenues dwindle; manufactures languish; the workpeople become paupers and a burden upon the State; agriculture suffers from the want of a demand for its products; foreign commodities which custom has made necessary or indispensable are augmented in price, and are smuggled into the country in spite of all precautions; so that the State loses its customs and its revenues diminish, or are collected with much difficulty, at the very time when expenditure on an extraordinary scale is unavoidable." *

One objection is sometimes raised which it may be convenient to meet at this point. It is said that if war brought so little inconvenience to trade it would become more frequent and would last longer. But if there is anything at

* Quoted by Mr. F. W. Hirst in his pamphlet on "Commerce and Property in Naval Warfare."

all in this objection, there is much more than it can possibly hold. The same argument would be good against any alleviation of the sufferings of war; and, if it is seriously accepted, the more firmly we believe in the blessings of peace the more strenuously we should have to resist the amelioration of war. The active members of Peace Societies on this view should all be members of Conscription Leagues, in order to spread the inconvenience of war over as wide an area as possible. But, in truth, the change would make war less likely, and for this reason. It used to be thought that democratic government would make war impossible, because the people would refuse to take part in quarrels from which they had so little to gain and so much to lose. But the sacrifices of war are, paradoxically enough, the chief source of a Government's power over the people in wartime. The passions of war are fed not so much by the hope of advantage as by the sense of injury; each fresh blow, unless it is in a vital spot, inflames the lust of battle, and drives the people to make common cause with their Government. But reduce a Government's power to punish its own people by war, and you eliminate passion and encourage a detached and critical habit of mind towards the subject matter of the quarrel. War which is persistently irrelevant to the main interests of

life cannot last. Moreover, if you reduce the injury that war can do to commerce, you also reduce the support that commerce is likely to give to armaments. Towards military armaments commerce and industry are not ordinarily sympathetic, for they tax without insuring. Naval armaments, however, are often regarded as an insurance tax. They would cease to be that if the operations of war ceased to have the power of inflicting direct loss on trade. In the exemption, therefore, of commerce from the operations of war at sea lies the chief hope of abating naval armaments. Especially is this the case with Germany, whose shipping interests have always been foremost in advocating the abolition of capture.

VI.

A SUMMARY.

We are now in a position to sum up the principal arguments advanced for the reform in the rules of maritime capture.

(1) The right of war on commerce has become an anachronism, because the relations of international trade have become so intimate that one nation cannot injure the trade of another without also injuring its own. Mr. Norman Angell has argued very forcibly for the proposition that under no circumstances can war advantage even a successful combatant. However much there is to be urged for this general proposition, it is almost mathematically demonstrable that a war on commerce may injure the victor as much as the victim. A German invader who sacked the Bank of England would injure the credit of his own Bank in Frankfort. The prize-money which a naval officer gets for seizing an enemy's ship and cargo is as surely taken out of the pockets of his own countrymen as of the enemy.

(2) The retention of the right of capture is, economically, a contradiction of Free Trade principles. There are two views of the State's relation to commerce. The first is military, and

broadly speaking, Conservative, under which the State acquires colonies in order to hold them as a commercial monopoly for the benefit of its manufacturers, or passes navigation laws prohibiting foreign ships from taking part in the trade between its own ports. The second is the economic, Liberal and Free Trade view, according to which the function of the State is limited to establishing equal conditions in which each nation shall do the work for which it is best adapted by nature. If a nation cannot benefit its trade by protective tariffs, neither can it alter the working of economic laws by destruction. The injury to trade by war is so much sheer waste of the common stock. The exemption of commerce, so far as is possible from the ravages of war, is therefore an essential part of free trade. Freedom from tariffs is one freedom; from a conception of foreign policy which imposes taxation on a country for objects that cannot promote its welfare is another freedom; from the destruction of actual war yet a third freedom.

(3) The right of capture is not only an anachronism in economics, but in strategy also. It was rational under the old rules under which the belligerent asserted the right to seize enemy's property even in neutral ships; but now that the neutral flag covers enemy's cargo, it injures the nation most which cannot avail

itself of neutral services. That nation is England, because it is an island and cannot import through neutral ports; because its profits from the carrying trade form so large a proportion of its wealth that it cannot afford to make them over to a neutral; because the navy is its first line of defence, and no nation can keep up a great navy without a great mercantile marine; and because no country is so completely dependent as she is on her supplies from over-sea. The abolition of capture, coupled with the abolition of commercial blockade, would ensure her in war-time abundant and cheap supplies of food for her people and of raw material for her industries; it would preserve the profits of her carrying trade, and remove any temptation to transfer her ships to another flag; it would give the navy complete strategic freedom of movement, unfettered by the thought of people and industries at home starving for supplies.

(4) The abolition of the right of capture would in effect internationalise three-quarters of the surface of the globe and place it under the rule of law. *Ego terrae dominus, lex maris*, said Justinian. Our navy, relieved from the duty of protecting or attacking commerce, would become merely the first line of defence. It no more need be double any other navy in strength than the army of a continental nation need be double that of its neighbour; and one great

cause of the growth of naval armaments would be cut away. The last link in the unnatural alliance between commerce and war would be broken, trade would be a power making constantly for peace, and the ideals of the early Free Traders would be brought sensibly nearer to fulfilment.

APPENDIX—A.

The writer has found it impossible to acknowledge his obligations in the course of the text, and the following list of the literature that he has found most serviceable may discharge some of his indebtedness and be useful to those who desire to pursue the subject.

The Hague Peace Conferences. By A. Pearce Higgins, LL.D. (Cambridge University Press).

Principles of International Law. By T. P. Lawrence, LL.D. (Macmillan).

Hall (W. E.) *International Law* (Clarendon Press).

Westlake *International Law, Part II.: War* (Cambridge University Press).

Capture in War on Land and Sea. By Hans Wehberg (P. S. King & Son).

Commerce and Property in Naval Warfare. Letters by Lord Loreburn, to the *Times.* Edited by F. W. Hirst (Macmillan and Co).

Capture at Sea. By Lord Loreburn, 1913 (Methuen & Co.).

The Declaration of Paris. By T. G. Bowles (Sampson Low).

Report of the Royal Commission on Supplies of Food in War Time, 1905. Cd. 2643.

Report of the Committee on a National Guarantee for the War Risks of Shipping, 1908. Cd. 4161.

APPENDIX—B.

The following statement made at the Maritime Conference at Copenhagen (1913) by Sir Edward Beauchamp, Chairman of Lloyd's, is worth reproducing as bearing on the difficult question of the liability of British underwriters for losses inflicted by the British Navy :—

British underwriters have naturally paid great attention to the question of the payment of claims on enemy goods insured with them, and the Committee of Lloyd's have obtained from their legal advisers an opinion, of which I will read the material parts :—

"1. Upon the declaration of war between Great Britain and a foreign Power all contracts pending between British subjects and subjects of the foreign Power become unenforceable so long as the war lasts.

2. Consequently a British underwriter is under no enforceable liability to a subject of the foreign Power in respect of a loss occurring during the war under a policy effected in time of peace; and, in respect of a loss which had occurred before the declaration of war under such a policy, he can claim to have legal proceedings against him for its recovery suspended until the restoration of peace.

3. But a British underwriter is not forbidden by law to pay the subject of the foreign Power in time of war for a loss which has occurred either during or before the war if he thinks fit to do so; nor does he commit any legal offence or render himself liable to any legal penalty by so doing. In the case of a loss sustained by a subject of the foreign Power before declaration of war, it rests entirely with the British underwriter to decide for himself whether he will claim suspension of legal proceedings until restoration of peace; and if he does not expressly claim this suspension in answer to an action brought against him, the courts will proceed with the trial of the action during and notwithstanding the war."

I am advised that the origin of the law as enunciated is to be found in the strict decisions given in the English courts during the Napoleonic wars, and, although these questions have not been directly brought forward in recent years, it is already evident that the tendency of the British courts is against the strict enforcement of the rules laid down at a time when the conditions of international commerce, including marine insurance, were on a very different footing from those existing at the present time. As Chairman of Lloyd's, I desire to make the following statements:—

First, I am advised that the records contain no case in which the British underwriters have resisted a claim on a marine policy for a loss by perils of the sea on any of the grounds referred to in the opinion which I have already read.

Secondly, my attention has been drawn to a recent article in the foreign press in which it is stated that the English underwriters are not only not bound by law to pay compensation to the subjects of enemy State for losses which arise during the war, even when the policy was concluded before the commencement of war, but that the payment is actually illegal. This statement is an inaccurate reproduction of the answer of the British Maritime Committee to the questionnaire, and is misleading. It is contrary to the opinion I have already read, which states unequivocally that "a British underwriter is not forbidden to pay the subject of a foreign Power in time of war for a loss which has occurred either during or before the war"; and, moreover, it entirely disregards the fact indicated in the answer to the questionnaire that the Crown has an inherent right to permit business with an alien enemy. It has been pointed out in the interesting answer to the questionnaire prepared for the Dutch Association by Mr. Loder that "laws are made in vain if they contravene the ideas of good faith and the sentiment of whatever is honest and of good report."

The position which the English underwriters have assumed, and which they have expressed their intention of continuing to hold, is that no contract of marine insurance will be repudiated by them on the ground that it covers enemy goods, but that all such contracts will be faithfully carried out during war as in time of peace, and I may say further for myself that the position taken up by the English underwriters is, in my opinion, the only one consistent with honesty and good faith.

The following leading article, quoted from the *Manchester Guardian* of July 4, 1913, draws the moral from Sir Edward Beauchamp's statement:—

We print to-day letters from the Secretary of the British Maritime Committee and from Mr. Acland, K.C., on a question that has been recently discussed in these columns —namely, whether British underwriters should pay claims made upon them by subjects of a country with which we are at war. There is a very widespread impression in Europe that this country still holds strictly by the doctrine of non-intercourse in war-time, and that payments during war under contracts made with an enemy are actually illegal. "An Englishman in Germany," in a letter that we published a fortnight ago, reported that many shipowners in Germany were alarmed at the prospect, and that there was some talk of forming new insurance companies for war risks in countries like Belgium and Switzerland, which are sure to be neutral, at any rate in a naval war. The letters that we publish to-day show that it is the intention of British underwriters to carry out their contracts in time of war as in peace. Sir Edward Beauchamp, the Chairman of Lloyd's, spoke so clearly at the recent Conference at Copenhagen that misunderstanding of his words should have been impossible. "The position," he said, "which the English underwriters have assumed and which they have expressed their intention of continuing to hold is that no contract of marine insurance will be repudiated by them on the ground that it covers enemy goods . . . and I may say for myself that the position . . . is in my opinion the only one consistent with honesty and good faith." Mr. Acland in his letter explains that payment of marine insurances is not illegal by British law, but only unenforceable. They are like gambling debts; but honest underwriters will pay their debts of honour as honest bookmakers pay theirs. No statements could be clearer; yet, as our correspondent's letter from Berlin showed, they have been misunderstood, or at any rate have failed to remove a misunderstanding.

But though there is no excuse for misunderstanding statements so clear, we can forgive the foreigner for being puzzled by the involved paradoxes of the present law. If and when this country goes to war the Crown will almost certainly issue a proclamation forbidding its subjects to trade with the

enemy. In spite of that underwriters mean to pay on their contracts, and what is more, if they do not raise the defence that there is a state of war, the courts will try actions on the contracts even while the war is in progress. The proclamation of non-intercourse with the enemy is in fact a blank cartridge, noisy but ineffectual. The foreigner who does not understand our Constitution is naturally puzzled by this double paradox of the Executive issuing a prohibition which the individual is at liberty to disregard and to which the Courts turn a blind eye. But there is a more remarkable paradox still. The British Navy in war is to capture as many of the enemy's merchantmen as it can lay hands on, but if they are insured in England, as most of them will be, English underwriters will pay the loss. The Admiralty still attaches great importance to this power of destroying the enemy's commerce as a means of shortening the war; and yet in many cases, perhaps in the majority of cases, the loss will fall not on the enemy, but on the English insurers. The force of paradox could no further go. It can only be resolved into reason and sense by abandoning the right of capture, which has become an anachronism, irreconcilable with the international character of modern trade. There is, however, one difficulty about which we are not clear. How far has the Government the right of confiscation of enemy's property, and how far is it exercisable? If the Government chose to confiscate the enemy's benefits under his marine insurance policies when they became payable, and could lay its hands on this property, would there be any remedy? We do not know, but about this we are clear—that the right of confiscating enemy's property at sea cannot be separated from its confiscation on land. Confiscation, whether it is right or wrong, is right or wrong on both elements; it cannot be right on one and wrong on the other. We hold that it should be in law, as it is in morality and in reason, wrong on sea as on land.

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